No. 01-1083

IN THE

Supreme Court of the United States

TEXTRON INC., *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Council On State Taxation (COST) as *amicus curiae* in support of the Petitioners in the above captioned matter.[1] COST is a non-profit trade association whose membership consists of over 540 multistate corporations involved in interstate and international commerce. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST's objective is to preserve and promote equitable and

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of the Petitioners and Respondent have been obtained and filed with the Clerk of the Court.

nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST pursues this objective through legislative and judicial educational and advocacy campaigns.

One of the issues[2] raised by the Petitioners involves whether a state taxing agency, when confronted with the need to remedy a tax ruled unconstitutional, may contravene the specific substantive statutory remedy provided by its legislature and instead substitute a new and different administrative remedy (which, as a result of its unexpected creation, may not be a remedy at all). The Massachusetts' decision at issue directly and negatively affects COST's members by unconstitutionally restricting the remedies for an invalid tax. The decision concerns COST members because, as large, multijurisdictional corporations, they are frequently involved in issues related to the validity of a particular state tax, including Massachusetts taxes. State legislators and tax administrators also commonly consult COST and its members for recommendations on crafting appropriate tax legislation. COST's members look to the certainty and clarity of the available remedy in determining whether to recommend to a legislature certain tax provisions. Such reliance on an available remedy provides certainty to both taxpayers and the state. As such, COST's members are directly affected by the rejection of such certainty in this case and, thus, have a strong interest in its outcome.

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[2] The Petitioners have raised several issues in their Petition, including a challenge to the Massachusetts corporate tax law as discriminating against interstate commerce in violation of the Commerce Clause, a challenge to the finding of the Massachusetts Supreme Judicial Court that the Petitioners lacked standing to bring the challenge to the tax, and a challenge to the determination that an administrative remedy may constitutionally replace a statutory remedy. COST supports Petitioners' positions on each of these points but submits additional discussion only on the remedy issue because Petitioners have fully briefed any arguments COST would offer regarding the other issues.

REASONS FOR GRANTING THE PETITION

COST is submitting this brief because a conflict is appearing between the states as to whether a state tax agency must follow a legislatively mandated remedy for a tax found unconstitutional. A serious difference of opinion exists between taxpayers and many state taxing authorities on this issue and this Court represents the only national forum available for addressing this conflict. COST believes that the constitutionally appropriate remedy for an invalid state tax is one of the most pressing issues this Court faces in the state and local tax area. Because of the confusion surrounding the remedy issue and its prominence, COST and its members request this Court to overturn the Massachusetts Supreme Judicial Court's upholding of the Massachusetts Commissioner of Revenue's Directive substituting a different administrative remedy for the statutorily mandated remedy because this decision violates the Due Process rights of the Petitioners and threatens the expectations of all taxpayers involved in state tax challenges, today and in the future.

ARGUMENT

Under The Due Process Clause Of The United States Constitution, The Massachusetts Commissioner Of Revenue Has Unconstitutionally Deprived The Petitioners Of Their Property When The State Taxing Authority Failed To Provide The Petitioners With The Statutorily Mandated Remedy, And Instead Substituted A New, Unforeseen, And Inferior Remedy.

Due Process Remedy Rules in State Tax Cases

A remedy for a state tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[3]

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[3] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the remedy must provide either a predeprivation remedy or "meaningful backward looking relief," *id.*; and 2) the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner*, 223 U.S. 280, 285 (1912); *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 39 n. 22 (1990).

Massachusetts' Remedy Design and Application

Massachusetts, during the years at issue (and continuing by statute today), imposes an excise tax for the privilege of doing business in the state on domestic and foreign corporations. The corporation excise tax was enacted by Ch. 355, Acts 1919, effective January 1, 1920, and replaced a franchise tax levied on the value of capital stock. The tax base is measured in part by net income and in part by tangible property or net worth.

In 1995, the Massachusetts Supreme Judicial Court ruled that in two instances the corporate excise statute was unconstitutional because it discriminated against interstate commerce in violation of the United States Constitution. *Perini Corporation, et al. v. Commissioner of Revenue*, 419 Mass 763, 647 N.E. 2d 52 (1995). The provisions at issue in *Perini* dealt with two differences in the formulas used by foreign corporations and domestic corporations in determining their tax liability. Domestic corporations were allowed to use formulas that provided tax benefits unavailable to foreign corporations.[4] In their brief, Petitioners have demonstrated that several other elements of the tax base

[4] The specific discriminatory provisions were: (i) the determination of a corporation's status as a tangible or intangible property corporation, and (ii) the calculation of net worth for intangible property corporations.

calculation also continue to discriminate against non-Massachusetts corporations.

Once the Massachusetts courts declared the corporation excise tax unconstitutional, Massachusetts was under a constitutional obligation to provide an appropriate remedy.[5] The tax statute itself provides the remedy. Chapter 63, Section 52 of the Massachusetts statute regarding "taxation of corporations" is entitled "Unconstitutionality of excise tax law; effect; revival of former act". This remedy provision states (emphasis and omissions to enhance readability):

> If the provisions of . . . [the current] excise on foreign corporations . . . are *declared unconstitutional* . . . by any such final judgment . . . *such portion of the law* . . . *shall be null and void*, and such portion of said law . . . shall become inapplicable . . .. In such event, all laws applicable to foreign corporations, which were repealed or were made inoperative as to, or inapplicable to, such corporations . . . shall thereupon *be revived* and become operative . . . and shall be continued in full force and effect from the first day of January antedating by five years the first day of January of the calendar year in which such final judgment . . . [declaring the current tax unconstitutional] is entered, to the same extent as if . . . [the current tax] had not been enacted. The

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[5] The remedy issue encompasses two distinct elements—procedural and substantive. *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 39 n. 22 (1990). A constitutionally adequate procedural remedy provides a method and a forum for a taxpayer to challenge a suspect tax. A constitutionally adequate substantive remedy fixes the infirmity of a tax once it is found unconstitutional. Here, the tax was ruled unconstitutional in an earlier case, but Petitioners have not been provided an adequate substantive remedy. Further, as noted in the Petitioners' brief, due to the improper finding of the Massachusetts court that most of the Petitioners lacked standing, they have not been afforded even a constitutionally adequate procedural remedy.

> commissioner and the local assessors shall . . . assess all taxes for which liability has been incurred under the laws revived . . . by the foregoing provisions . . .. *Excises declared invalid* by reason of the foregoing premises, which were assessed on or after the date when the laws repealed or made inoperative or inapplicable by . . . [the current tax] are revived, made operative or applicable or continued in force as herein provided, shall, to the extent that such excises have been paid and are unrefunded, *be credited against the taxes assessed for the same period under the laws revived* and again made operative, applicable and continued in force; provided, that if such credit exceeds the taxes due, *the excess shall be refunded.*

What does this language mean? It means that, *by statute*, if the current Massachusetts excise tax on corporations is ruled unconstitutional, the current tax disappears and the tax in existence before the current one becomes effective. This is the absolute rule enacted by the state legislature.

The statutory scheme in place before the current excise tax imposed a tax based on the capitalization of authorized stock of a foreign corporation. This statutory scheme was put in place in 1909 and was replaced by the current, now invalidated, system. There is no argument that that is what the statute provides.

The determination in *Perini* (and the other elements detailed in the Petitioners' brief) that the tax is unconstitutional should have triggered this statutory provision, to wit: the excise tax should cease to exist, and the tax on corporations must now to be calculated under the prior statutory scheme. However, the Massachusetts Department of Revenue did not impose the previous tax scheme. *Instead*, it created an entirely different remedy for injured taxpayers. In January of 1999 (four years after the tax was found unconstitutional by Massachusetts' highest court) the

Department of Revenue issued Directive 99-1 purportedly detailing the *sole* remedy for the unconstitutional excise tax on foreign corporations. That remedy allows taxpayers, both in-state and out-of-state, to *choose* which statutory formulas to use in calculating their excise tax. Thus, under the Directive, foreign corporations could now use the calculations formerly allowed only for domestic corporations.

The Directive (if actually enforced) may have eliminated the constitutional discrimination problem in *Perini*, but it failed to provide a constitutional remedy because it retroactively replaced the guaranteed statutory remedy. While it is pure conjecture as to why the Department had developed such a fondness for their current system, *amicus* is suspicious that the revenue implications of instituting the statutory remedy had something to do with the decision. *Amicus* understands, and in fact supports, states' efforts to address revenue issues prudently and conservatively, particularly in these uncertain economic times. However, what *amicus* cannot support is the complete replacement of an explicit, substantive, legislatively mandated remedy by an administrative, non-binding directive.

Massachusetts' Retroactive Substitution of A Non-Binding Administrative Remedy for a Clear, Substantive Legislative Remedy Violates the Due Process Clause

Due Process requires a remedy for an unconstitutional tax to be "clear and certain." A "clear and certain" remedy is a remedy that the taxpayer was aware of at the time it chose to protest the tax. The terms "clear and certain" imply that a taxpayer knows what its options are—that the remedial options are specifically defined and guaranteed. Absent such simple notice, a remedy cannot be "clear and certain."

Massachusetts' statutes provided a clear, substantive remedy for the situation in which the current corporate excise tax was found unconstitutional. The law provides that if the

current corporate excise tax is ruled unconstitutional, that law disappears and the prior capital stock tax becomes effective. The current corporate excise tax was in fact found unconstitutional but the Department of Revenue has prevented Petitioners from calculating their tax under the prior capital stock provisions.[6] Instead, the Department has substituted a new, retroactive, completely different, and financially inferior remedy for the statutory guarantee. At no point during the litigation over the constitutionality of the excise tax on foreign corporations was such a remedy contemplated. The legislature has never blessed such an administrative remedy. No taxpayer could have anticipated that given the clear, long-standing, legislative pronouncement regarding the legally required remedy that a different remedy would be adopted by the taxing agency after the litigation was lost by the state. Such a retroactive substitution by an administrative body of a legislative remedy is not "clear and certain"—it is confusing and unexpected—and thus cannot be constitutional.

This discussion over the administrative versus the legislative remedy is not an academic exercise—the state has kept money required to be refunded to the Petitioners under the legislatively mandated remedy. The difference between the remedy offered to the Petitioners under the Commissioner's calculation and what the taxpayer should receive under the statutory scheme is the due process violation. The Legislature promised the taxpayers a certain tax calculation, and the tax agency should not be allowed to take it away. A more quintessential taking of property without due process is hard to imagine.

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[6] The Department has never argued, and in fact no argument exists, that the statutory remedy provision is not relevant to the sections of the excise tax found unconstitutional.

Finally, as the Petitioners point out, the remedy provided by Massachusetts actually violates one of the clear standards already articulated by this Court—a state may not "bait and switch" in applying a remedy. *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich v. Collins*, the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected this argument. *Id.* at 111. "Bait and switch" in the consumer protection world occurs when a company advertises a product, such as a television, for a very low price in order to entice a customer to enter the store. Once in the store, the customer is told that the store does not have that product but is offered a similar but different product for a more expensive price. Frequently, because the customer is already at the store and is prepared to make a purchase, the customer will buy the substitute and the store will make a higher profit than it would have made on the advertised product. This is just what Massachusetts did here: it offered the statutory remedy of reversion to the prior law if the current tax was found invalid, but when the Petitioners came to court to obtain the advertised remedy, the state basically said—we won't provide the statutory relief, but what we can offer you are these new, costly calculations. The Petitioners came to court expecting refunds under the statutory remedy scheme; the refunds were mandated by statute. Therefore, the Petitioners are owed the statutory relief originally provided.

States' Interpretations of the "Clear and Certain" Remedy Rule Are In Conflict

This Court's involvement in the remedy issue is particularly pressing because of a conflict that is arising among the states that have been confronted with the issue. For example, confronted by a situation similar to the current case, the Court of Appeals of New York held that the taxing agency *must follow* the statutory remedy, even though the remedy crafted by the taxing agency would otherwise have also fixed the invalidity of the tax. *City of New York v. State of New York*, 94 N.Y.2d 577 (2000). In this case, a commuter tax by New York City imposed only on residents of states other than New York was determined by the Court of Appeals to violate the Commerce Clause and the Privileges and Immunities Clause. In the statute applying the tax only to non-New Yorkers, the legislature had specifically provided that if the tax was found to be unconstitutional, then the tax was to be repealed in its entirety. The tax was ultimately ruled unconstitutional, and the City of New York proposed that the appropriate remedy would be to apply the tax to both non-residents and residents. This proposed remedy would have fixed the unconstitutional discrimination, but it was not the remedy provided for in the statute. Thus, the New York Court of Appeals rejected this remedy and followed the statutory requirement repealing the entire tax. The New York approach is not isolated. The Court of Appeals of Arizona has similarly held that the Department of Revenue did not have authority to add additional conditions to a tax refund, not found in the statute. *Arizona Dep't of Revenue v. Canyoneers*, 23 P.3d 684 (2001). The decisions in New York and Arizona are directly contrary to the decision in Massachusetts at issue here.

In fact, confusion abounds in general about when a new, different, unexpected remedy for an invalid tax may be imposed retroactively. Some states take the high road and

some states fight to the death to keep the ill-gotten gains. In *W.R. Grace & Co. and Chrysler Motors Corp. v. State of Washington, Department of Revenue*, 973 P.2d 1011, *cert. denied*, 528 U.S. 950 (1999), the Washington Supreme Court approved the retroactive application of a conditional credit as the sole remedy for the unconstitutional tax. In *General Motors Corp. v. City and Cty. of San Francisco*, 69 Cal. App. 4th 448 (1999), the California Court of Appeal came to the opposite conclusion (involving an almost identical tax) and mandated full refunds rather than the taxing authority's proffered conditional, partial refunds. Recently, following the finding in *In the Matter of Panhandle Eastern Pipe Line Co. et al.*, Kan. Supreme Ct., No. 86,277 (2002), that a tax benefit was illegally withheld, the state of Kansas announced plans to refund $25 million to the affected taxpayers. One of Kansas' state representatives recognized a fact that Massachusetts seems to have failed to internalize: Senate Minority Leader Anthony Hensley (D-Topeka) commented that: "I'm not sure we have any other option at this point . . .. We lost the suit." Massachusetts, like Kansas, lost the suit and therefore has no other option – it needs to pay up. Obviously, the disparity in the results demonstrated by these cases demonstrates a need for guidance and the role of providing such guidance falls squarely on this Court.

Procedural Reason for Accepting the Case for Review

An unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and a mandate that the states provide this relief is also necessary because of the limited forums available to taxpayers to pursue the available remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts. U.S. Const. Amend. XI; 28 U.S.C.

§ 1341. The Eleventh Amendment[7] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state law. *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 422, 444 (1998). Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy, and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax remedy cases in the past, review by this Court is anything but guaranteed. Thus, taxpayers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to ensure that these state courts provide a constitutionally sufficient remedy, COST respectfully requests this Court to accept this case for review.

Remedy Issue Is Of Significant Importance

Finally, we note why we are so exercised about this case. It is not hyperbole to state that the issue of remedies for unconstitutional taxes is one of the single most important issues[8] in state and local tax today. Time and again over the past several years, taxpayers have been denied a constitutional remedy by state courts. This is real money being lost by real taxpayers. With the loss of this money, a certain amount of faith in the system is also lost. Taxpayers' only recourse is to appeal to this Court. States continue to

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[7] "The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state . . .." U.S. amend. XI.

[8] The other pressing issues being nexus concerns and discriminatory taxes.

impose unconstitutional taxes and when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration[9] to taxpayers and this Court is the only forum in which a solution is available. In fact, over the past year the issue of remedies has reached such significance in the state and local tax community that the topic has been a feature of at least three of the major state tax conferences.[10] Perhaps, if the states are forced to confront the true costs of providing a constitutionally adequate remedy, the legislatures will be more mindful in crafting their tax statutes to begin with and will be quicker to fix a constitutional problem when it comes to light. If this Court clearly exhibits its intent to enforce the Constitution's remedy rules on the states, states like Alabama (unconstitutional franchise tax) and California (unconstitutional dividends received deduction) may decide in the future not to keep their clearly unconstitutional taxes on their books for a lengthy and ultimately costly fight. Such a result will save the states, taxpayers, and ultimately this Court unnecessary and repetitive litigation. COST and its members hope that this Court will again add light to this important issue.

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[9] The lack of adequate remedies has become somewhat of a depressing joke at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

[10] Paul J. Hartman (Vanderbilt) State & Local Tax Forum 2001, New York University State and Local Tax Institute 2001, Georgetown SALT Institute 2002.

CONCLUSION

For the reasons stated above, and because this tax scheme is one confronted and challenged by taxpayers in several states, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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